Supreme Court, U. S.
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NO.____

in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

SUSAN T. SMITH,

Petitioner

vs.

E. H. DAWS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT. (COURT OF APPEALS NUMBER 79-1581)

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August, 1980

QUESTIONS PRESENTED

1. DOES PETITIONER, A PREFERENCE ELIGIBLE EMPLOYEE, HAVE THE RIGHT TO JUDICIAL REVIEW OF AN ADVERSE ARBITRATION AWARD?

2. WOULD A SUBSEQUENT POLICY CHANGE BY THE CIVIL SERVICE COMMISSION (MERIT SYSTEM PROTECTION BOARD) AFFECTING EXCESSIVE APPROVED ABSENCES INURE TO THE BENEFIT OF PETITIONER?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT. (COURT OF APPEALS NUMBER 79-1581)

OPINIONS BELOW

On November 20, 1978, The District Court of the Southern District of Florida entered an Order and Final Judgment affirming the arbitrator's decision as final and binding and confirming Summary Judgment for the Defendant on the ground that the Court was without jurisdiction.

On April 4, 1980, the U.S. Court of Appeals for the Fifth Circuit affirmed the decision of the District Court of the Southern District of Florida. The opinion of the Court of Appeals is reported at page 4426. On May 27, 1980, Petitioner's application for rehearing was denied. A copy of the Order denying this application is attached hereto as Exhibit "A" of Appendix.

JURISDICTION

This petition seeks review of a judgment dated April 4, 1980. A Petition for rehearing was filed by petitioner. This Petition was denied on May 27, 1980.

Jurisdiction to review the judgment in question by Writ of Certiorari is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved due process of law as provided by the Fourteenth and Fifth Amendments to the Constitution of the United States and Section 301 of the Labor Management Relations Act (29 U.S.C. 185 (A)). The Fourteenth Amendment of the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection or the laws.

The Fifth Amendment of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 United States Code §185 provides:

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner, (Appellant below) a distribution clerk with 9 years service in the Postal Service, was given removal notice for unsatisfactory attendance effective October 19, 1976. Petitioner filed a grievance and for an arbitration hearing pursuant to the National Agreement between the United States Postal Service and the union. The grievance was denied by the Postal Service and the arbitrator after hearing entered an opinion and award on May 9, 1977 affirming the denial.

On November 14, 1977 the Petitioner filed suit in the United States District Court, Southern District of Florida under 39 U.S.C. 1208(b) naming the Postmaster of Miami, Florida, as Defendant. Essentially, the Petitioner's complaint alleged that her discharge was contrary to the National Agreement, ie. the contract between the United States Postal Service and the union, in that her alleged unsatisfactory absences were authorized by the employer and therefore not good cause for dismissal.

Respondent filed a Motion to Dismiss the Complaint alleging that the arbitration award was final and binding; that there was just cause for termination due to unsatisfactory attendance; that there was no allegation that the union representation was improper and there was no motion to vacate or modify the award filed.

The Court denied the Motion and the Respondent filed an answer alleging lack of jurisdiction; that the adverse award of the arbitration was final and binding pursuant to the terms of the contract; and that the action was barred by laches, among other things, but admitted that administrative approval of the use of sick leave was granted for absenteeism due to illness.

In June of 1978 the Respondent filed a Motion for Summary Judgment and a memorandum in support thereof stated that the Complaint was not timely filed; that it failed to allege breach of duty by the union; that the Court lacked jurisdiction in that the grievance-arbitration procedure was the exclusive remedy and that determination, pursuant to the National Agreement procedure, was final and binding.

Thereafter, on November 20, 1978, the District Court entered an Order and Final Judgment affirming the arbitrator's decision as final and binding and confirming Summary Judgment for the Respondent on the ground that the Court was without jurisdiction.

The Petitioner filed a Motion to appeal in Forma Pauperis that was denied by the District Court on January 22, 1979.

On August 14, 1979, Petitioner noticed his appeal in The United States Court of Appeals for the Fifth Circuit. In an opinion dated April 4, 1980, the Court of Appeals affirmed the decision of the District Court. Petitioner filed a timely petition for rehearing before the Original Panel. This application was denied on May 27, 1980.

B. Statement of Facts

The Petitioner (Appellant below) was a preference eligible employee of the Postal Service, having served as a Distribution Clerk for some 9 years prior to her removal for unsatisfactory attendance effective October 19, 1976.

The Petitioner went through the grievance-arbitration procedures and was effectively terminated by final and binding arbitration Order and Award of May 9, 1977.

Petitioner's work history was found to be excellent. T-35. She missed work because of various sicknesses, including phlebitis. Her absences were in part attributable to a work connected injury to her leg. ROP-pages 222-223. Petitioner's absences began in February 1975. These absences were administratively approved. T-33. The Petitioner was working regularly and on the date of her removal, October 19, 1976. ROP-page 225.

ARGUMENT

ISSUE NO. 1

DOES PETITIONER, A PREFERENCE ELIGIBLE EMPLOYEE OF THE POSTAL SERVICE, HAVE THE RIGHT TO JUDICIAL REVIEW OF AN ADVERSE ARBITRATION AWARD?

The Petitioner, a preference eligible employee, ie. a permanent employee, one who has completed a probationary or trial period as an employee of a federal

government executive agency, must exhaust all administrative remedies pursuant to any collective bargaining contract before seeking judicial review. *Vaca v. Sipes,* 386 U.S. 171. Petitioner submits that the grievance-arbitration procedure under the National Agreement constituted exhaustion of her administrative remedy, and culminated in the adverse Order and Award of the Arbitrator of May 9, 1977. Therefore, all contractural remedies available to Petitioner having been exhausted, the Petitioner under Section 301 of the Labor Management Relations Act (29 U.S.C. 185(A)) had the personal right to seek judicial relief through the Court system. *Smith v. Evening News Association,* 371 U.S. 195, 83 S.Ct. 267.

An employee should not be bound by the failure of the union to pursue a judicial remedy so long as the union has finalized the administrative route in accordance with its bargaining agreement with the employer.

The District Court has inherent jurisdiction to review an administrative decision of a government agency involving personal and property rights to determine whether the employee was afforded procedural due process and whether the ultimate action of the agency was arbitrary or capricious.

Assuming, arguendo, that the Court has jurisdiction, the scope of review of administrative decisions is limited basically to two issues: (1) whether the procedural requirements of the statutes have been complied with; and (2) whether the action of the agency officials was arbitrary or capricious or not supported by substantial evidence. *Vigil v. Post Office Dept.*, 406 F.2d 921 (10th Cir. 1969); *Benson v. United States*, 421 F.2d 515 (9th Cir. 1970), cert. denied, 398 U.S. 943 (1970); *O'Leary v. Macy*, 294 F.2d 434 (D.C. Cir. 1961), cert. denied, 370 U.S. 953 (1962); *McTiernan v. Gronouski*, 377 F.2d 31 (2nd Cir. 1964); *Hargett v. Summerfield*, 343 F.2d 29 (D.C. Cir. 1957); cert. denied, 353 U.S. 970 (1975).

In *Hargett v. Summerfield*, supra, the Court noted that the policy of restricting the role played by the courts in review of employee removal cases was necessary to preserve the autonomy of an agency in dealing with disciplinary matters. Specifically, the Court at page 32 stated:

> "These cases and others (citations omitted) of similar import, decided both before and after the passage of the Administrative Procedure Act in 1946, make it clear that employee removal and discipline are almost entirely matters of executive agency discretion, and that judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation. This has resulted in an unbroken line of authorities holding that, so long as there was

substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable as to the wisdom or good judgment of the department head in exercising his discretion." (citations omitted).

Therefore, if there has been substantial compliance with the appropriate regulations and statutes the courts will generally refrain from reviewing the merits of the case or upsetting administrative proceedings. *Seebach v. Cullen,* 338 F.2d 663 (9th Cir. 1964), cert. denied, 380 U.S. 972 (1965); *Jarrett v. Reasor,* 426 F.2d 213 (9th Cir. 1970). See also *Chiriaco v. United States,* 235 F.Supp. 850 (N.D. Ala. 1963), affirmed 339 F.2d 588 (5th Cir. 1964); *Rubin v. United States,* 150 Ct.Cl. 28 (1960); *Chiaverini v. United States,* 157 Ct.Cl. 371 (1962).

Although, the union urged the Arbitrator to consider that Petitioner's absences were approved by management, the Arbitrator decided the contention to be without merit. T-78. In effect the Arbitrator found that approved absences upon which the removal was predicated was just cause.

To envelop an unsuspecting employee in an adverse action founded on management's approved absences is tantamount to entrapment non pareil.

Notwithstanding the rule enunciated by the Arbitrator, with which the Petitioner agrees, to the effect that the employer has the right to expect acceptable levels of attendance, an adverse decision based on approved excessive absences is arbitrary and capricious and contrary to law. Therefore, the District

Court had ample grounds to assume jurisdiction. *McClendon v. Blount*, 452 F.2d 381.

In *Gernand v. United States*, 1969, 412 F.2d 1190, 188 Ct.Cl. 544, certiorari denied 94 S.Ct. 105, 414 U.S. 844, 39 L.Ed.2d 65, rehearing denied 94 S.Ct. 382, 414 U.S. 1017, 38 L.Ed.2d 253, the Supreme Court held that failure to appeal within 10 days after effective date of an adverse action decision as provided by regulation was not in itself a jurisdictional bar on question of timeliness of appeal.

The Supreme Court held delay of over 27 months which resulted in substantial prejudice to a government agency (TVA) constituted laches which barred the action. *Baskin v. Tennessee Valley Authority*, D.C. Tenn. 1974, 382 F.Supp. 641, affirmed 519 F.2d 1402.

Laches should not attach where the time of filing is reasonable and the Petitioner is not continuously represented by counsel as is the case here.

The District Court should have taken jurisdiction and granted the Petitioner relief in that the arbitrator misconstructed the rule applicable to the evidence presented.

ISSUE NO. 2

WOULD A POLICY CHANGE BY THE CIVIL SERVICE COMMISSION (MERIT SYSTEM PROTECTION BOARD) AFFECTING EXCESSIVE APPROVED ABSENCES INURE TO THE BENEFIT OF THE APPELLANT?

The adverse action against the Petitioner based on unsatisfactory attendance began with the notice of removal sent by the Postal Service on September 17, 1976. The arbitration Award of May 9th, 1977 resulted in Petitioner's grievance being denied. The Civil Service Commission in April 1978 altered its policy and decided that an adverse action based on a record of approved leave is not such cause as would promote the efficiency of the service. Memorandum, dated April 13, 1978, Senior Assistant Postmaster General, Employee and

Labor Relations Group, Subject: Discipline for Excessive Absence.

Since the principal upon which the arbitrator made his decision has changed it would be unfair to adjudicate this case under the old rule.

The evidence of the Petitioner's absences for illness was substantially proven at the hearing and the approval of said absences by management was admitted. ROP-page 210.

The Petitioner was working at the time of her removal. ROP-page 225. The fact that she had worked for nearly nine years and was considered an excellent employee augurs well for her ability to return to productive employment with the Postal Service.

The Petitioner urges the Court to consider the changed policy of the Civil Service Commission and to adjudicate her rights on that basis. To deny the Petitioner the opportunity for reconsideration would be inequitable and against the dictates of justice. MERIT SYSTEMS PROTECTION BOARD, **DECISION,** (*IN THE MATTER OF Francis A. Kibort*), dated June 29, 1979.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been served upon opposing counsel, ATLEE W. WAMPLER, U.S. ATTORNEY, 155 South Miami Avenue, Suite 700, Miami, Florida by U.S. Mail, postage prepaid, this 25th day of August, 1980.

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APPENDIX

EXHIBIT "A"

FILED MAY 27 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1581

SUSAN T. SMITH,
Plaintiff-Appellant,

versus

E. H. DAWS, as Postmaster,
United States Postal Service, Miami, Florida,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

(May 27, 1980)

Before RONEY, KRAVITCH and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

[Illegible]

United States Circuit Judge